

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

10 IN RE: PORTFOLIO RECOVERY ASSOCIATES, LLC, TELEPHONE CONSUMER PROTECTION ACT LITIGATION } Case No. 11md2295 JAH(BGS)
11 } This document relates to:
12 } All member cases
13 }
ORDER RE: STAY

14 This Court, on May 20, 2014, granted defendants' motion to stay this action on
15 primary jurisdiction grounds and directed the parties to file a joint status report in re
16 regards to the propriety of allowing the stay to remain in place no later than November 19,
17 2014. *See* Doc. # 144. On November 19, 2014, the parties filed their joint status report.
18 Doc. # 177. Plaintiffs contend that the stay should be lifted because the petitions that
19 were pending before the Federal Communications Commission ("FCC") upon which the
20 stay was based have been taken off the FCC's circulation list and, thus, are no longer
21 pending.¹ *Id.* at 1, 5. Plaintiff claim "that the FCC's petition process has been hijacked
22 and abuse[d] by defendants or potential defendants who seek to create a justification for

25 ¹ Defendants based their original stay request on the following petitions: (1) Communications
26 Innovators Petition for Declaratory Ruling; (2) GroupMe, Inc./Skye Communications S.A.R.L. Petition for
27 Expedited Declaratory Ruling; (3) YouMail, Inc. Petition for Expedited Declaratory Ruling; (4) the
28 Professional Association for Customer Engagement (PACE) Petition for Expedited Declaratory Ruling; and
 (5) Glide Talk, Ltd. Petition for Expedited Declaratory Ruling. Doc. # 123-1 at 3-5. Plaintiffs explain that
 Communications Innovators and Group Me withdrew their petitions, YouMail's petition was filed while
 YouMail was a defendant in Gold v. YouMail, Inc., which has since been dismissed, and GlideTalk's petition
 similarly was based on a case that is no longer pending. Doc. # 177 at 2-4.

1 indefinite delays of TCPA cases under the primary jurisdiction doctrine.”² Id. at 6.
2 Plaintiffs point out that at least one court has lifted a stay that was in place because of
3 pending FCC petitions “when it appeared the FCC had not ruled and could not say when
4 a ruling would occur.” Id. at 5 (citing Jordan v. NationStar Mortgage, 2014 WL 5359000
5 *10 (N.D.Cal. Oct. 20, 2014)). Plaintiffs urge the Court to follow the reasoning presented
6 in that case. Id. at 5-6. Plaintiffs claim the fact that the FCC has already twice held
7 predictive dialers constitute ATDSs for purposes of the Telephone Consumers Protection
8 Act (“TCPA”) and a determination of the meaning of “capacity” is not a proper reason to
9 apply the primary jurisdiction doctrine. Id. at 7-8. Plaintiffs further claim that the
10 “prevailing trend amongst courts is to reject FCC petitions on ‘capacity’ as a basis to stay
11 TCPA cases under the primary jurisdiction doctrine.” Id. at 7-8 & n. 5 (citing Knapp-Ellis
12 v. Stellar Recovery, Inc., 2014 WL 5023632 *3 (W.D. Wash. Oct. 8, 2014); Prater v.
13 Medicredit, Inc., 2014 WL 4652942 *4 (E.D. Mo. Sept. 18, 2014); Holcombe v. Credit
14 Protection Ass’n, LP, 2014 WL 4252277 *3 (M.D. Ga. Aug. 28, 2014); Bates v. Dollar
15 Loan, LLC, 2014 WL 4231302 *3 (D.Nev. Aug. 26, 2014); Morse v. Allied Interstate,
16 LLC, 2014 WL 2916480 *2 (M.D. Pa. June 26, 2014); Murray v. Diversified Consultants,
17 Inc., 2014 WL 2574042 *2 (M.D. Fla. June 9, 2014); Trainor v. Citibank Nat’l Ass’n,
18 2014 WL 2574527 *2 (D. Minn. June 9, 2014); Fenescey v. Diversified Consultants, Inc.,
19 2014 WL 2526571 *3 (M.D. Pa. June 4, 2014); Swope v. Credit Mgmt., LP, 2013 WL
20 607830 *4 (E.D. Mo. Feb. 19, 2013); Pimental v. Google, Inc., 2012 WL 1458179 *3
21 (N.D.Cal. Apr. 26, 2012)).

22 Defendants do not dispute that some of the petitions it previously relied upon are
23 no longer pending before the FCC but points out that the FCC has yet to issue a ruling on
24 the term “capacity” which is the central focus of this Court’s prior stay order. Doc. # 177
25 at 9. Defendants point out that there are two petitions still pending before the FCC of
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28 ² Plaintiffs request the opportunity to conduct discovery on this claim should the stay be continued.
See Doc. # 177 at 6 n. 2.

1 which the FCC has sought public comment.³ Id. at 9-10. Defendants contend “the FCC’s
2 resolution of the [p]etition submitted by ACA International ..., in particular, is promising
3 given ACA’s November 3, 2014 correspondence to the FCC,” noting that ACA has
4 requested the FCC rule on the specific issue.⁴ Id. at 10 (citing Marks v. Crunch San
5 Diego, LLC, 2014 WL 5422976 *3 (S.D. Cal. Oct. 23, 2014)). Defendants point out that
6 the ACA petition is directly on point to address a central matter in this action. Id. at 11.
7 In addition, defendants claim plaintiffs’ abuse argument is a “red herring,” pointing to
8 several courts that have recently entered stays under the primary jurisdiction doctrine
9 pending a decision on the issue of the term “capacity.” Id. at 12 (citing Pickens v. Am.
10 Credit Acceptance, LLC, 2014 WL 466512 *2-3 (S.D. Ala. Sept. 19, 2014); Wahl v.
11 Stellar Recovery, Inc., 2014 WL 4678043 *2 (W.D.N.Y. Sept. 18, 2014); Lee v.
12 LoanDepot. com, LLC, 2014 WL 4145504 *2 (D. Kan. Aug. 20, 2014)). Thus,
13 defendants contend it is appropriate to continue the stay to allow the FCC to issue a
14 decision on the term “capacity.” Id. at 13.

15 This Court, in an abundance of caution, finds that continuing the stay of
16 proceedings in this case is appropriate because the FCC is still in the process of utilizing
17 its recognized expertise in determining an issue that is currently pending before this Court,
18 thereby satisfying the prerequisites for application of the primary jurisdiction doctrine.
19 See Maronyan v. Toyota Motor Sales, U.S.A., Inc., 658 F.3d 1038, 1048-49 (9th Cir.
20 2011). This Court further finds that the benefit of FCC guidance on the issue of the
21 definition of the term “capacity” necessitates a further stay of this action pending the
22 FCC’s resolution of that issue which is presently before it. In order to alleviate plaintiffs’
23 concerns regarding delay, this Court will revisit the propriety of the stay in three months.

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³ These petitions include (1) ACA International Petition for Rulemaking; and (2) the PACE Petition
26 for Expedited Declaratory Ruling. Doc. # 177 at 9-10 n. 6.

27 ⁴ Defendants explain that the ACA requests “the FCC clarify that: ‘(1) just because a predictive dialer
28 can be an [ATDS] does not mean that a predictive dialer must be an ATDS under the [TCPA]’ and ‘(2)
‘capacity’ for TCPA purposes means present ability of a dialing system at the time the call is made.’” Doc.
177 at 10 (citing November 3, 2014 letter from ACA International to the FACC available at
<http://apps.fcc.gov/edfs/document/view?id=600000978459>.

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. This case shall continued to be **STAYED** until further order of the Court;

3 2. The parties shall file a joint status report **no later than February 20, 2015**,

4 to advise the Court as to the status of the matters currently before the FCC;

5 and

6 3. Should the FCC resolve the matters pending before it prior to the

7 February 20, 2015 deadline, the parties shall jointly advise the Court **no**

8 **later than five (5) days** after the FCC issues such resolution.

9 DATED: December 1, 2014

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11 JOHN A. HOUSTON
12 United States District Judge

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